

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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MARK R. MARASCHIELLO,

Plaintiff,

**DECISION AND ORDER**  
10-CV-187A

v.

CITY OF BUFFALO POLICE DEPARTMENT and  
H. MCCARTHY GIPSON,

Defendants.

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The above-referenced case was referred to Magistrate Judge Leslie G. Foschio pursuant to 28 U.S.C. § 636(b)(1). On January 6, 2011, plaintiff filed a motion for partial summary judgment. (Dkt. No. 22.) On February 18, 2011, defendant H. McCarthy Gipson ("Gipson") filed a cross-motion for partial summary judgment. (Dkt. No. 32.) On September 13, 2011, Magistrate Judge Foschio filed a Report and Recommendation (Dkt. No. 49), recommending that plaintiff's motion be denied and that Gipson's cross-motion be granted. Additionally, Magistrate Judge Foschio recommended granting defendant City of Buffalo Police Department ("City") summary judgment *sua sponte*.

Plaintiff filed objections to the Report and Recommendation on October 11, 2011. Defendants filed responses to plaintiff's objections on November 4, 2011. The Court held an initial oral argument on December 19, 2011. Because plaintiff

raised concerns about Magistrate Judge Foschio's *sua sponte* recommendation of summary judgment to the City, the Court gave formal notice that it was contemplating an adoption of the recommendation and gave all parties an opportunity to file supplemental briefing. See *NetJets Aviation, Inc. v. LHC Commc'ns, LLC*, 537 F.3d 168, 178 (2d Cir. 2008) (authorizing district courts to grant summary judgment *sua sponte* "after giving the party against which the court is contemplating such a decision notice and an opportunity to present evidence and arguments in opposition"). The parties filed supplemental briefing accordingly, and the Court held a supplemental oral argument on January 24, 2012.

Pursuant to 28 U.S.C. § 636(b)(1), this Court must make a *de novo* determination of those portions of the Report and Recommendation to which objections have been made. Upon a *de novo* review of the Report and Recommendation, and after reviewing the submissions, the Court adopts the proposed findings of the Report and Recommendation.

Accordingly, and for the reasons set forth in Magistrate Judge Foschio's Report and Recommendation, plaintiff's motion for summary judgment (Dkt. No. 22) is denied. Defendant Gipson's cross-motion for summary judgment (Dkt. No. 32) is granted. The Court also grants the City summary judgment *sua sponte*. The Court declines to exercise supplemental jurisdiction over plaintiff's state-law claim. The pending motions to extend time for discovery (Dkt. No. 48) and to

strike plaintiff's second supplemental memorandum of law (Dkt. No. 65) are denied as moot.

The Clerk of the Court shall close this case.

SO ORDERED.

*s/ Richard J. Arcara*

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HONORABLE RICHARD J. ARCARA  
UNITED STATES DISTRICT JUDGE

DATED: February 15, 2012